

1 HONORABLE JAMES L. ROBART
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 MICROSOFT CORPORATION,

10 Plaintiff,

11 v.

12 MOTOROLA, INC., et al.,

13 Defendants.

14 MOTOROLA MOBILITY, INC., et al.,

15 Plaintiffs,

16 v.

17 MICROSOFT CORPORATION,

18 Defendant.

No. C10-1823-JLR

MICROSOFT'S 9/10/12 MOTION TO
FILE DOCUMENTS UNDER SEAL

NOTED FOR:

Friday, September 21, 2012

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order
entered in this case, Microsoft respectfully seeks leave to file under seal the following
documents:

(1) Limited Portions of Microsoft's Reply in Support of Its Rule 702 Motion to
Preclude Testimony by Charles R. Donohoe and Dr. Ramamirtham Sukumar
(Microsoft's "*Daubert* Reply"); and

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MICROSOFT'S 9/10/12 MOTION TO FILE
DOCUMENTS UNDER SEAL - 1

No. C10-1823

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1 (2) Exhibits 6 and 7 to the Second Declaration of Christopher Wion in Support of
 2 Microsoft's Rule 702 Motion to Preclude Testimony by Charles R. Donohue
 3 and Dr. Ramamirtham Sukumar (the "9/10/12 Wion Declaration").

4 Microsoft seeks to file the foregoing materials under seal because they contain
 5 information that has been identified by either Microsoft or Motorola as confidential business
 6 information under the terms of the operative protective order issued in this case.

7 For these reasons, and as more fully described below, good cause exists for protecting
 8 the confidentiality of these documents. Microsoft respectfully requests permission to file the
 9 above-referenced documents under seal and that the Court direct such documents to remain
 10 under seal. Microsoft is filing a redacted version of its *Daubert* Reply as part of the public
 11 record.

12 II. FACTS & AUTHORITY

13 A. **The Operative Protective Order and Applicable Court Rules Permit Microsoft to** **File Confidential Information under Seal.**

14 Pursuant to the Protective Order issued by the Court on July 21, 2011, Microsoft is
 15 permitted to file materials designated by either party as Confidential Business Information¹
 16 under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a)
 17 and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a)
 18 provides:

19 Any information submitted in pre-trial discovery or in a pleading, motion, or
 20 response to a motion in this action, either voluntarily or pursuant to order, and
 21 which is asserted by a supplier to contain or constitute Confidential Business
 22 Information shall be so designated by such supplier in writing...and shall be
 23 segregated from other information being submitted. Documents shall be clearly
 24 and prominently marked on their face with the legend: "[SUPPLIER'S NAME]
 25 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO
 PROTECTIVE ORDER" or a comparable notice. During the pre-trial phase of

1 "Confidential Business Information" is defined in the parties' Protective Order as "information which has not
 2 been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or
 3 apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories,
 4 amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure
 5 and Use of Discovery Materials (ECF No. 72), ¶1.

1 this action, such information, whether submitted in writing or in oral testimony,
 2 shall be disclosed only *in camera* before the Court and shall be filed only under
 3 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District
 4 Court for the Western District of Washington.

5 Paragraph 8 likewise provides that:

6 Any Confidential Business Information submitted to the Court in connection
 7 with a motion or other proceeding within the purview of this action shall be
 8 submitted under seal pursuant to paragraph 2 above.

9 *Id.*, at ¶ 8.

10 The Federal Rules of Civil Procedure recognize that courts may permit parties to file
 11 “trade secrets or other confidential research, development, or commercial information” under
 12 seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly
 13 competing needs and interests of the parties affected by discovery,” in crafting the appropriate
 14 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*
 15 *Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,
 16 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

17 Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in
 18 support of a non-dispositive motion upon a showing of good cause. Where the material sought to
 19 be sealed “includes information about proprietary business operations, a company’s business
 20 model or agreements with clients, there are compelling reasons to seal the material because
 21 possible infringement of trade secrets outweighs the general public interest in understanding
 22 the judicial process.” *Selling Source, LLC v. Red River Ventures, LLC*, 2011 U.S. Dist. LEXIS
 23 49664, 18 (D. Nev. Apr. 29, 2011).

24 Further, while the public generally enjoys a right to inspect and copy public records, “it
 25 is uncontested … that the right to inspect and copy judicial records is not absolute. Every court
 26 has supervisory power over its own records and files, and access has been denied where court
 27 files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper

1 purpose" is where the commercial business information at issue is sought to be used as a
 2 "source[] of business information that might harm a litigant's competitive standing." *Id.*
 3 (denying access to copies of tapes played at trial and noting that courts refused public access to
 4 their files where granting such access might "become a vehicle for improper purposes,"
 5 including causing a litigant competitive harm). Good cause exists to grant Microsoft's motion
 6 to seal.

7 **B. Good Cause Exists for Microsoft to File the Referenced Documents under Seal.**

8 1. Exhibit 6 –Michael Dansky's Deposition Transcript.

9 Exhibit 6 to the 9/10/12 Wion Declaration is a copy of the transcript from the
 10 September 5, 2012 deposition of Motorola's expert, Michael Dansky. Microsoft has been
 11 informed that Motorola intends to designate the transcript as confidential under the Protective
 12 Order. At his deposition, Mr. Dansky testified regarding the content of his opening and
 13 rebuttal expert reports, which were both designated by Motorola as "Highly Confidential –
 14 Attorneys' Eyes Only" under the terms of the Protective Order. Mr. Dansky also was
 15 examined regarding opinions offered by another Motorola expert, Charles R. Donohoe, whose
 16 expert reports were likewise designated as "Attorneys' Eyes Only." Mr. Dansky's testimony
 17 and the expert reports referenced extensively throughout the course of his deposition disclose
 18 confidential and non-public financial and business information relating to both Microsoft and
 19 Motorola, and should be maintained under seal.

20 2. Exhibit 7 – Expert Report of Tim Williams.

21 Exhibit 7 to the 9/10/12 Wion Declaration is a copy of the July 24, 2012 opening report
 22 of Motorola's expert, Tim Arthur Williams. Motorola did not designate Mr. Williams'
 23 opening expert report as containing Confidential Business Information. However, Motorola
 24 did designate his deposition transcript and his rebuttal expert report as containing Confidential
 25 Business Information. Motorola has also informed Microsoft that Mr. Williams' opening

1 report should be filed under seal. For these reasons, and because Mr. Williams' report
2 discusses confidential, non-public information relating to the parties' patents that could
3 potentially lead to competitive harm if disclosed publicly, Microsoft is filing Mr. Williams'
4 opening report under seal.

3. Microsoft's Daubert Reply Includes References to Confidential Information Contained in the Above-Referenced Exhibits, which Should Be Redacted

Microsoft's *Daubert* Reply includes references to and descriptions of the confidential information contained in the above-referenced exhibits to the 9/10/12 Wion Declaration. To the extent that the Court determines that those exhibits should remain filed under seal, Microsoft's *Daubert* Reply should be redacted to avoid disclosure of the confidential information contained in those exhibits. Microsoft is seeking to file under seal only those limited portions of its *Daubert* Reply that contain information that should be protected from public disclosure under the governing standards outlined above. While a complete and unredacted version of the *Daubert* Reply is being filed under seal, Microsoft is filing a redacted version as part of the public record.

III. CONCLUSION

Microsoft has filed the above-referenced documents under seal in compliance with the terms of the Protective Order and the applicable Court rules. Nothing herein is intended as a waiver of Microsoft's right to contest Motorola's designation of material as Confidential Business Information in accordance with the terms of the Protective Order. Microsoft expressly reserves the right to do so as the circumstances warrant.

A [Proposed] Order Granting Microsoft's 9/10/12 Motion to File Documents Under
Seal has been submitted herewith.

1 DATED this 10th day of September, 2012.

2 CALFO HARRIGAN LEYH & EAKES LLP

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38 Counsel for Microsoft Corp.

CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 10th day of September, 2012, I caused the preceding document to be on counsel of record in the following manner:

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10 DATED this 10th day of September, 2012.
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7 s/ Linda Bledsoe
8 LINDA BLEDSOE
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